on these points – had full notice of IDJ's arguments. Indeed, the District Court entered an attorneys' fee award against IDJ because of its persistence in "repeating grounds and theories that the Court already had thoroughly dealt with and denied" and in "reiterati[ng] . . . issues and arguments that the Court has consistently rejected" – including the "stranger to the contract" tortious interference argument cited here. (SPA 6 (citing SPA 53)). The petition for certiorari should be denied.

Factual Background

Introduction

This case arises from a contractual dispute between IDJ, a division of UMG Recordings, Inc., and TVT Records, the largest independent recording label in the United States. The dispute involved one central issue: whether IDJ breached an agreement permitting TVT to distribute a record album by an unproven, unknown hip-hop trio called "Cash Money Clique" ("CMC") that had never before released an album. (Pet. App. 2a). The District Court summarized the narrow "quarrel" between the parties as follows:

> At bottom, at issue in this case is a contract dispute and a related copyright infringement claim between two competitors [IDJ and TVT] relating to whether proper consent was secured for the services of two IDJ artists [Ja Rule and Irv Gotti] who previously had produced or recorded for TVT. (SPA 46).

The case involved no personal injury and no harm to the public. (Pet. App. 20a). Nonetheless, after three weeks of

trial – first on liability and then on damages – a jury awarded TVT (and its publishing arm TVT Music, Inc.) an astounding $132 million in tort damages: $25 million in compensatory damages and $107 million in punitive damages. (In contrast, the jury awarded TVT only $126,000 in breach of contract damages.) (Pet. App. 6a; 7a n.2). The jury's shocking verdict stemmed from a series of erroneous legal and evidentiary rulings that transformed this narrow contractual dispute over a never-released album from an unknown group into a tort case that supposedly warranted more than $100 million in punitive damages. The Second Circuit's reversal vindicated consistent arguments throughout the litigation that TVT's tortious interference, fraud and copyright infringement claims were legally baseless.

The Dispute Between the Parties

The dispute between IDJ and TVT is rooted in an earlier relationship between TVT and two hip-hop artists: record producer Irving Lorenzo, known professionally as "Irv Gotti," and hip-hop artist Jeffrey Atkins, known professionally as "Ja Rule." In the early 1990s, Gotti worked for TVT, finding and developing new talent. In 1994, Gotti brought an unknown trio to TVT known as "Cash Money Clique." The members of CMC – including Ja Rule – signed exclusive recording contracts with TVT. CMC recorded a number of songs for TVT but no CMC album was ever released. (Pet. App. 2a; A691-94, A697, A782-83, A788-90).

In 1996, Gotti left TVT and became a talent scout for IDJ, and in 1998 – after TVT's president, Steven Gottlieb, executed a release concerning Ja Rule – Gotti persuaded the artist to record exclusively for IDJ. Although neither Gotti nor Ja Rule had experienced success at TVT, their careers

skyrocketed with IDJ. Gotti produced albums for numerous well-known hip-hop artists that have sold millions of copies, while Ja Rule released three albums that each sold more than a million copies. In 1999, Gotti entered into a 50/50 joint venture with IDJ that did business under the name "Murder, Inc." The joint venture agreement provided that Gotti's talent search and producer services would be exclusive to IDJ and Murder, Inc., and that Ja Rule's recordings would be released under the Murder, Inc. label. (*See* Pet. App. 2a; A696-97, A780-81, A790-92, A801, A927, A2586-87 at ¶¶ 1, 3-4, A2974).

In 2001, TVT moved to capitalize on the popularity Gotti and Ja Rule had achieved with IDJ. A TVT employee approached Gotti – despite Gotti's and Ja Rule's exclusive relationships with IDJ – about finishing the CMC album. TVT's lawyer told Gotti's lawyer that the old CMC songs "weren't particularly good" and "weren't the best representation of Ja Rule's work," but that TVT would nonetheless release them if Gotti and Ja Rule did not "play ball." TVT also threatened to sabotage Ja Rule's next IDJ release – by releasing the old CMC recordings at the same time – if Gotti and Ja Rule did not cooperate. (A697-98, A706-07, A796-98, A1083, A1088, A1236-39, A1243). Lyor Cohen, IDJ's chairman, was upset by TVT's approach to IDJ's exclusive artists and by its threats, and believed that releasing the out-of-date CMC recordings would seriously damage Ja Rule's career and his value to IDJ. (*See* Pet. App. 3a; A637-38, A701, A983, A1086, A1187, A1218, A1240).

Despite Gotti and Ja Rule's exclusive agreements with IDJ and Murder, Inc., Gottlieb induced them to sign a contract for the CMC album, referred to as the "Heads of Agreement" ("HOA"). To motivate Gotti and Ja Rule to pressure IDJ to

consent to this project, the HOA provided that they would receive $200,000 "when [IDJ] signs-off on this Heads of Agreement." (*See* Pet. App. 3a; A858, A863-64, A867-68, A871, A2429 at §§ III(b) and V, A2432, A102 at ¶13).

TVT's approach to Gotti and Ja Rule came at a delicate time for IDJ. Gotti was renegotiating the Murder, Inc. joint venture agreement with IDJ, and through his production company was likewise renegotiating the terms of Ja Rule's future recordings for IDJ. Cohen was very reluctant to tell Gotti that he could not do the CMC project and permitted IDJ to enter into negotiations with TVT regarding the proposed CMC album, even though it was obvious to Gottlieb, Gotti, and Gotti's lawyer that Cohen "hate[d]" the proposed deal. (*See* Pet. App. 3a; A638, A772-73, A799-801, A988, A994-995, A1004, A1086, A1137, A1240).

In the summer of 2001, a TVT lawyer and an IDJ in-house lawyer negotiated a "Side Letter Agreement" ("SLA") that would amend the HOA and authorize Gotti's and Ja Rule's participation in the CMC project. The two lawyers ultimately agreed to a draft that, *inter alia*, amended the HOA's 50/50 profit split (between TVT on the one hand, and Murder, Inc./Gotti/Ja Rule on the other) to a 30/30/40 profit split among IDJ; Murder, Inc./Gotti/Ja Rule; and TVT. While Gottlieb testified that Cohen said "we['ve] got a deal" in a Labor Day weekend telephone conversation, Cohen denied this allegation, and the record is clear that Cohen told his IDJ subordinates that they were not authorized to close the deal. (*See* Pet. App. 4a; A678, A683, A686, A844-45, A892, A998-1001, A1089, A2312).

Gotti did not meet the November 2, 2001 delivery date set forth in the HOA for the CMC album, and informed

Gottlieb in August 2002 that he was pushing back the CMC album until spring 2003. At about this time, Cohen told Gottlieb that IDJ would not agree to the SLA authorizing Gotti and Ja Rule to produce the CMC album. On August 14, 2002, IDJ sent a letter to TVT confirming its rejection of the SLA. TVT filed this lawsuit on August 20, 2002, in the Southern District of New York.

Proceedings in the District Court

TVT's lawsuit alleged that IDJ had (1) committed breach of contract (by breaching the SLA); (2) defrauded TVT by concealing its intention not to perform under the SLA; (3) tortiously interfered with the HOA; and (4) committed copyright infringement through fraudulently procuring copyright licenses from TVT by falsely promising to permit the release of the CMC album. (Pet. App. 5a – 6a). The District Court denied Respondents' motion for summary judgment (*see* Pet. App. 45a), and trial began on March 10, 2003. On the fourth day of trial, well into TVT's case, the District Court – over IDJ's objection – bifurcated the trial into liability and damages phases. (A949-56). On March 17, 2003, Respondents moved for judgment as a matter of law ("JMOL") pursuant to Rule 50(a). (*See* Pet. App. 46a).

Throughout the proceedings in the district court, IDJ argued that if the Court (or jury) found that an oral agreement embodying the SLA had been created, IDJ was necessarily a party to the HOA, because the SLA and HOA constituted a single contract. Consequently, IDJ could not have tortiously interfered with Gotti's and Ja Rule's performance under the HOA. (Pet. App. 8a n.4; 8a – 9a).

On March 21, 2003, the jury found IDJ liable for breach of contract, and Respondents jointly and severally liable for tortious interference, fraudulent concealment, and copyright infringement. (Pet. App. 6a). The District Court refused to allow Respondents to file Rule 50(b) motions challenging these liability determinations. (SPA 190-93). On April 9, 2003, the District Court issued its decision and order denying Respondents' Rule 50(a) motion, addressing at length, and then rejecting, Respondents' "single contract" theory of immunity from tortious interference liability. (Pet. App. 51a – 52a).

After a week-long damages trial two months later, the same jury assessed compensatory and punitive damages against Respondents in an aggregate amount of approximately $132 million. (Pet. App. 6a).

On June 16, 2003, Respondents moved for JMOL under Fed.R.Civ.P. 50(b) on Petitioners' state law and copyright claims, and also moved, in the alternative, for a new trial and/or remittitur pursuant to Fed.R.Civ.P. 59. Respondents again argued that they could not be held liable for tortious interference with the HOA because they were "parties to the contract that was interfered with" insofar as "IDJ was a party to the Side Letter Agreement which was incorporated into the Heads of Agreement." (Pet. App. 93a). The District Court noted that this argument had also been "raised by Defendants in their motion for summary judgment" and rejected at that time. (Pet. App. 93a). The District Court further noted that the "same arguments [were] presented and rejected in [the] context of Defendants' motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a) following [the] liability phase" of the trial. (Pet. App. 93a-94a).

On September 2, 2003, the District Court denied IDJ's motions for JMOL and for a new trial, but granted its motion for remittitur, reducing the punitive awards to $25 million for tortious interference, $1 million for fraud, and $125,000 for breach of contract. (Pet. App. 6a; SPA 60). The compensatory awards of $22,358,713 for tortious interference, $1,011,313 for fraud, $150,000 for copyright infringement,[3] and $126,720 for breach of contract, remained undisturbed. (SPA 60). Petitioners accepted the remittitur, and the District Court entered an amended final judgment on October 1, 2003. (SPA 10-12). In an October 22, 2003 decision, the District Court awarded TVT $222,822.53 in attorneys' fees. (SPA 2).

Proceedings in the Second Circuit

IDJ appealed from the liability verdicts on tortious interference, fraudulent concealment, and copyright infringement, as well as the compensatory and punitive damages awards on those claims. IDJ did not appeal from the breach of contract compensatory award of $126,000, but did appeal the punitive award for breach of contract.

The Second Circuit reversed the District Court's judgment, holding "that TVT's claims for tortious interference and for fraudulent concealment fail for lack of a legally sufficient evidentiary basis" and that, as a matter of law, TVT was not entitled to assert a copyright claim, because it had not "rescinded the licenses on which its infringement claim is based." (Pet. App. 7a). Applying settled principles of New York law, the Second Circuit ruled that TVT's tortious

3. The jury originally awarded TVT $411,275 for copyright infringement. TVT subsequently elected to accept the $150,000 statutory damage award. (Pet. App. 6a n.1).

interference claim failed as a matter of law because the "HOA and SLA are one agreement" to which IDJ was a party. Because IDJ was a party to the HOA allegedly interfered with, TVT's tortious interference claim failed as a matter of law and "there was nothing for the jury to decide." (Pet. App. 10a).

The Second Circuit rejected TVT's "perfunctory contention that appellants failed to preserve this argument on appeal." (Pet. App. 8a n.4). The Court referred to TVT's waiver argument as "perfunctory" because this point – which is the basis for this petition for certiorari – was a throwaway argument in a three-sentence footnote. In its entirety, the argument read: "Defendants' argument presumes that they properly preserved their 'same contract' challenge in their 50(a) motion. Defendants did not. (A-1194:14-1195:6). Thus, Defendants waived their 'same contract' argument, too." *See* Brief of Appellees TVT Records and TVT Music, Inc., dated April 16, 2004, at 36 n.14.

The Second Circuit went on to reject TVT's waiver argument because it was clear from the record that "the court and the plaintiffs received multiple notices of, and a full opportunity to meet, the argument" by virtue of Respondents' reiteration of the argument throughout the District Court proceedings, including in their answer to the amended complaint, in their summary judgment motion, in the joint pre-trial order, in their pretrial memorandum, and in their requested jury instructions. (Pet. App. 8a n.4). The Second Circuit noted that Respondents made their "single contract" argument so many times that the District Court not only explicitly rejected it in denying summary judgment, but also "saw fit to dispose of the argument in its denial of the [Respondents'] Rule 50(a) motion." *Id.*

With respect to TVT's fraudulent concealment claim, the Second Circuit held that New York law precluded liability since an alleged "intention to breach does not give rise to a duty to disclose," and thus TVT could not recover tort damages sounding in fraud. (Pet. App. 12a).

The Court likewise rejected TVT's copyright infringement claim, which were based on a theory that certain copyright licenses had been obtained by the same alleged fraud. The Second Circuit did not reach the merits of the copyright claim, however, holding that "the District Court mistakenly concluded that '[a] fraudulently induced copyright license is invalid' *ipso facto*," when in fact "the license must formally be rescinded before an infringement action based on fraudulent inducement of a copyright license can proceed." (Pet. App. 16a). No such rescission had occurred here (and TVT has never contended otherwise). Because TVT had not satisfied a prerequisite for its infringement claim – rescission – the Second Circuit did not reach the question of whether the copyright licenses had been procured by fraud.

On July 12, 2005, TVT petitioned the Second Circuit for rehearing and rehearing en banc. In its petition, TVT complained that "the ground for reversal [of its copyright infringement claim] was raised for the first time in the panel's opinion and, thus, TVT was never afforded an opportunity to be heard." TVT Rehearing Petition at 4. TVT acknowledged in its petition, however, that "'the rule that an order will not be reversed upon a point first raised upon appeal is not absolute.'" *Id.* (quoting *New York, N.H. & H.R. Co. v. Reconstruction Fin. Corp.*, 180 F.2d 241, 244 (2d Cir. 1950)). On December 30, 2005, the Second Circuit denied TVT's rehearing petition. (Pet. App. 159a).

REASONS FOR NOT GRANTING THE PETITION

I. THE DECISION BELOW DOES NOT RAISE THE QUESTION PRESENTED IN THE PETITION

The question presented in TVT's petition is:

> Whether the Second Circuit, in conflict with the law of the First, Third, Fourth and Fifth Circuits, erred by setting aside the jury's verdict and granting judgment as a matter of law, on grounds not preserved in Respondents' motions under Federal Rule of Civil Procedure 50, based on its view that the strictures of Rule 50 do not apply to "questions of law." (Pet. at i).

Even assuming that Petitioners' imagined circuit split exists – which, as discussed below, it does not – the Second Circuit did not decide that question in this proceeding. The Court of Appeals did not determine that IDJ had waived its "single contract" argument nor did it state that "the strictures of Rule 50 do not apply to 'questions of law.'" (Pet. at i). Accordingly, the fundamental premise for the petition is incorrect. For this reason alone, the petition should be denied.

The Second Circuit found that IDJ preserved its "single contract" argument by repeatedly raising it in the District Court proceedings, including: (1) in its answer to the amended complaint; (2) in its summary judgment motion; (3) in the joint pretrial order; (4) in its pretrial memorandum; and (5) by requesting a jury instruction on the issue.

(Pet. App. 8a n.4).[4] Indeed, IDJ reiterated its tortious interference argument so many times that the District Court not only addressed the argument in its denial of IDJ's Rule 50(a) motion (Pet. App. 8a n.4; *see also* SPA 187), but premised its attorneys' fees award on IDJ's insistence on raising the argument throughout the litigation even after the District Court had repeatedly rejected it. (*See* SPA 6 (citing SPA 53)).

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4. The Court stated:

> We find TVT's perfunctory contention that appellants failed to preserve this argument on appeal to be without merit. To the contrary, we are satisfied that they raised it at a number of critical junctures during District Court proceedings. The argument was unambiguously raised in defendants' reply memorandum in further support of their summary judgment motion and in their pre-trial memorandum. They unsuccessfully requested a jury instruction to the effect that they could not be liable for tortious interference if the jury were to find that IDJ was a party to the HOA. The point was also made in their answer to the amended complaint and in the joint pre-trial order. We are not troubled by the fact that the defendants did not reiterate this claim in their Rule 50(a) motion because the court and the plaintiffs received multiple notice of, and a full opportunity to meet, the argument. Significantly, the District Court had already rejected the argument in its opinion denying summary judgment. *See TVT Records v. Island Def Jam Music Group*, 244 F.Supp.2d 263, 275 (S.D.N.Y. 2003). Moreover, we also note that District Court saw fit to dispose of the argument in its denial of the appellants' Rule 50(a) motion. See *TVT Records*, 2003 WL 1858151, at *4 (S.D.N.Y. Apr. 9, 2003). Defendants' obligation was to give clear notice, not to make pests of themselves.

(Pet. App. 8a n.4).

As part of its effort to fabricate a conflict among the circuit courts and a violation of this Court's precedents, TVT mischaracterizes the Second Circuit's decision. According to TVT, "[t]he Second Circuit relied on the[] ["single contract" argument and copyright license rescission] issue[] as grounds for JMOL – though Respondents failed to preserve them – based on an exception for 'legal' issues that contravenes the unambiguous requirements of Rule 50." (Pet. at 11). Petitioners' fictionalized account of the proceedings below is refuted by the Second Circuit's stated reasoning for rejecting TVT's waiver argument, in which it never once invokes TVT's imagined "issue of law" exception to Rule 50.

Moreover, the Second Circuit's determination that IDJ preserved its "single contract" argument by repeatedly raising it throughout the district court proceedings is hardly the "controversial theory" that TVT claims (Pet. at 15), but is entirely consistent with the well-settled rule that:

> [t]he ultimate consideration in determining the sufficiency of a pre-verdict motion is whether it meets the purposes served by the specificity requirement, either in its contents or in the context in which it is made. The purpose of the specificity requirement is twofold: (1) to ensure that the trial court has an adequate basis for a decision on the motion; and (2) to afford the adverse party an opportunity to correct any possible infirmities in the proof presented. Accordingly, if the trial court and the parties actually are aware of the grounds for the motion, strict enforcement of the

> specificity requirement is unnecessary to serve the purposes of Rule 50(a)(2).

Moore's Federal Practice, ¶ 50.21[2] at 50-47 – 50-48 (Matthew Bender 3d ed. 2006). As discussed below, the First, Third, Fourth and Fifth Circuits – which according to TVT more strictly construe Rule 50 – have adopted the interpretation of Rule 50 reflected above. (*See* Section III, *infra*).

TVT also argues that the Second Circuit's ruling rejecting its copyright infringement claim – because of TVT's failure to rescind the copyright licenses it had given to IDJ – also somehow violates Rule 50. (Pet. at 10, 18-19). But this objection has nothing to do with Rule 50. Petitioners' complaint is that the Second Circuit raised the rescission issue *sua sponte*. It is well settled, however, that a Court of Appeals has the discretion to reach an issue for the first time on appeal. (*See* Section II.A., *infra*). And, while the failure of the copyright claim flowed directly from the Second Circuit's rejection of the accompanying fraud claim upon which the infringement claim was premised, the Court of Appeals was permitted under this Court's precedents to rely on a more fundamental flaw in Petitioners' infringement claim – TVT's failure to seek formal rescission of the copyright licenses. (Pet. App. 16a).

II. IT IS WITHIN THE COURT OF APPEALS' DISCRETION TO REACH AN ISSUE FOR THE FIRST TIME ON APPEAL

A. *Singleton v. Wulff* Explicitly Permits a Circuit Court to Reach an Issue for the First Time on Appeal

Contrary to TVT's claim that "[t]his Court has repeatedly held that strict compliance with Rule 50 is a necessary predicate to obtaining appellate review of a jury's verdict" (Pet. at 10), *Singleton v. Wulff*, 428 U.S. 106, 120 (1976), makes clear that no such limitation on the Court of Appeals' jurisdiction exists. In *Singleton*, this Court articulated the rule that:

> [t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt . . . or where "injustice might otherwise result."

428 U.S. at 120 (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941) (citations omitted)). Here, "the proper resolution" of TVT's copyright infringement claim was "beyond any doubt" in light of both the undisputed facts and the Second Circuit's earlier precedents. Significantly, TVT has never denied that – in the words of the Second Circuit – it "neither sued for rescission of the [copyright] licenses nor alleged the breach of any covenant related to their grant." (Pet. App. 16a).

Accordingly, there was nothing unusual or improper in the Second Circuit's exercise of its discretion to reverse the judgment on TVT's copyright infringement claim and correct the District Court's "mistaken[] conclu[sion] that '[a] fraudulently induced copyright license is invalid' *ipso facto*." (Pet. App. 16a).

Rather than discuss *Singleton*, TVT misrepresents *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 218 (1947), and its progeny, including *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 126 S. Ct. 980 (2006), as mandating "that strict compliance with Rule 50 is a necessary predicate to appellate review of a jury's verdict." (Pet. at 14).

Cone and its progeny, however, neither mandate "strict compliance with Rule 50" nor address what questions the circuit courts may resolve for the first time on appeal. Rather, these decisions discuss "the implications of a party's failure to file a postverdict motion under Rule 50(b)" and Rule 59. *Unitherm*, 126 S.Ct. at 985. Thus, *Cone* and *Unitherm* stand for the proposition that "'[i]in the *absence* of such a [Rule 50] motion' an 'appellate court [is] without power to direct the District Court to enter judgment contrary to the one it had permitted to stand.'" *Unitherm*, 126 S.Ct. at 986 (quoting *Cone*, 330 U.S. at 218)) (emphasis added). In other words, only when a party completely fails to move for JMOL or a new trial in the district court is the Court of Appeals precluded from granting such relief on appeal.

For example, in *Unitherm*, the appellant, ConAgra, "moved for a directed verdict under Rule 50(a) based on legal insufficiency of the evidence . . . *and neither renewed its*

motion for judgment as a matter of law pursuant to Rule 50(b), nor moved for a new trial . . . pursuant to Rule 59." *Unitherm*, 126 S. Ct. at 984 (emphasis added). This Court held that "since [ConAgra] had failed to renew its preverdict motion as specified in Rule 50(b), there was no basis for review of respondent's sufficiency of the evidence challenge in the Court of Appeals." *Id.* at 989.

In *Cone*, this Court held that the fact that "[r]espondent *did not move for judgment nothwithstanding the verdict* as it might have done under Rule 50(b)," rendered "the appellate court . . . without power to direct the District Court to enter judgment contrary to the one it had permitted to stand." 330 U.S. at 213, 218 (emphasis added). Similarly, in *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48 (1952), this Court held that because respondent moved "to set aside the verdict and for a new trial within the time required by Rule 50(b) . . . *[but] failed to comply with permission given by 50(b) to move for judgment n.o.v. after the verdict* . . . respondent is entitled only to a new trial, not to a judgment in its favor." 344 U.S. at 54 (emphasis added). Finally, in *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1948), this Court held that "[i]t was error . . . for the Circuit Court of Appeals to direct the District Court to enter judgment for the respondents," when after the petitioner was granted a directed verdict, respondents "moved for a new trial on the ground . . . that there were many contested issues of fact which should have been submitted to the jury . . . *[but] did not move for judgment under Rule 50(b).*" 332 U.S. at 572, 574 (emphasis added).

The proceedings below stand in stark contrast to *Unitherm*, *Cone*, *Johnson*, and *Globe Liquor*, where appellants had failed to make Rule 50(b) motions. Here, there is no dispute that IDJ moved for JMOL pursuant to Rule 50(a), moved for JMOL pursuant to Rule 50(b) after the jury returned its verdict, and also moved for a new trial pursuant to Rule 59. (Pet. App. 6a, 46a). In its Rule 50(b) motion, IDJ attacked the legal sufficiency of each of the claims on which TVT had prevailed at trial, including the tortious interference and copyright claim at issue here. (*See*, *e.g.*, A2053-85). In particular, IDJ repeated the same "single contract" argument on tortious interference that it had raised throughout the district court proceedings and that was ultimately adopted by the Second Circuit. (Pet. App. 93a; *see also* A2063) Therefore, *Unitherm* and *Cone* simply do not apply here.

III. THERE IS NO CIRCUIT CONFLICT

Given that the Second Circuit – in rejecting TVT's waiver claim concerning IDJ's "single contract" argument – never invoked the supposed "issue of law" exception to Rule 50 to which TVT objects, Petitioners' contention that the "First, Third, Fourth and Fifth Circuits have expressly rejected the exception to Rule 50 [for "questions of law"] invoked by the Second Circuit in the decision below" (Pet. at 21), is irrelevant.[5] But even if the Second Circuit had relied upon such an exception, TVT is incorrect that the First, Third, Fourth and Fifth Circuits apply Rule 50 more stringently. In

5. As to the copyright infringement claim, the Second Circuit's only allusion to Rule 50 is the following footnote: "[w]e note that when the trial court denies a Rule 50 motion, both that denial and 'errors of law in the trial court may be raised on appeal.' 9A C. Wright & A. Miller, Federal Practice & Procedure, § 2540, at 373 (1995)." (Pet. App. 15a n.8).

all of these circuits, technical non-compliance with Rule 50 may be excused provided that the movant satisfies the purpose of the rule by asserting its position in a manner that provides the District Court and the opposing party with notice of the alleged deficiency or error and thereby an opportunity to cure it. TVT is equally incorrect in asserting that these circuits forbid appellate consideration of issues not raised in the district court. (*See, e.g.*, Pet. at 12, 21-25).

The First Circuit, for example, has acknowledged that "even in the light of our own stringent adherence to the requirement of a timely formal [Rule 50] motion," an issue may be adequately preserved for appeal where a party makes only "the functional equivalent of a motion for judgment as a matter of law" by, for example, raising the issue during a chambers conference. *Simon v. Navon*, 71 F.3d 9, 14 (1st Cir. 1995).

The First Circuit has also recognized that it "has the power in an exceptional case, to resolve an issue not passed on below." *Mainegeneral Medical Center v. Shalala*, 205 F.3d 493, 500 (1st Cir. 2000) (citation omitted). And, even absent compliance with Rule 50, the First Circuit will still "review simply . . . as to 'whether the record reflects an absolute dearth of evidentiary support for the jury's verdict,' and will reverse the district court if "its ruling is 'obviously insupportable.'" *Davignon v. Clemmy*, 322 F.3d 1, 13 (1st Cir. 2002) (citation omitted). Indeed, even in *Tapalian v. Tusino*, a decision cited by TVT (Pet. at 22), the First Circuit reviewed the movant's waived argument for plain error, notwithstanding his noncompliance with Rule 50. *Id.*, 377 F.3d at 7 n.1 (". . . even if the issue had not been waived . . . we can perceive no plain error").

Similarly, the Third Circuit recognizes a functional equivalent exception to Rule 50, and does not measure the sufficiency of a Rule 50(a) motion by the text alone, but "against the background, as reflected in the record, of what the party now claiming waiver understood as to the tenor of the Rule 50 movant's position and theory. . . . 'The communicative content, "specificity" and notice giving function of an assertion [in a rule 50(a) motion] should be judged in context.'" *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 519 n.18 (3d Cir. 1998); *see also Acosta v. Honda Motor Co., Ltd.*, 717 F.2d 828, 832 (3d Cir. 1983) (defendant's motion for a directed verdict sufficiently specific where, despite "the imprecision of the sentences uttered by defendants' counsel at the time of his Rule 50(a) motion for a directed verdict, plaintiff's counsel and the court understood and responded to defendants' counsel as well as if he had been more specific at the time").

While the Third Circuit "generally refuse[s] to consider issues that are raised for the first time on appeal . . . this in no way undercuts the Supreme Court's teaching" in *Singleton v. Wulff*, (*Roe v. Casey*, 623 F.2d 829, 833 n.11 (1980) (citation omitted)), because "[t]his rule is one of discretion as opposed to jurisdiction." *Kneipp v. Tedder*, 95 F.3d 1199, 1211 n. 25 (3d Cir. 1996). Thus, the Third Circuit has examined the merits of a defense of failure to state a claim upon which relief can be granted that was not raised until after trial, stating that "in unusual circumstances the courts of appeals also have inherent power to reach issues although not timely

raised below." *Weaver v. Bowers*, 657 F.2d 1356, 1361 (3d Cir. 1981), *cert. denied*, 455 U.S. 942 (1982).

The Third Circuit has held that both an objection to or a request for a jury instruction is the functional equivalent of a Rule 50 motion if it is clear that the district court treated it as such. *See, e.g., Chemical Leaman Tank Lines, Inc. v. Aetna Cas. and Sur. Co.*, 89 F.3d 976, 993 (3d Cir. 1996) (citing *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802, 814-15 (3d Cir. 1984), *cert. denied*, 477 U.S. 908 (1986)). The Third Circuit has also addressed an issue raised for the first time on appeal where plaintiff has failed to raise a waiver objection to the defendants' Rule 50(b) motion before the district court. *See, e.g., Williams v. Runyon*, 130 F.3d 568, 572 (3d Cir. 1997). And, in *Repola v. Morbark Indus. Inc.*, 934 F.2d 483, 488-89 (3d Cir. 1991), the Court held that "when an argument is raised in support of a motion *in limine*, but the court reserves disposition of the motion and never decides it . . . counsel reasonably may conclude that the court has the motion under continuous advisement and that it need not be restated" in a Rule 50(a) motion.

The rule is the same in the Fourth Circuit. In *Singer v. Dungan*, 45 F.3d 823, 828-829 (4th Cir. 1995), for example, the Fourth Circuit excused the movants' failure to "renew their motion at the close of all of the evidence." In doing so, the Court noted that it had in previous cases "reviewed the sufficiency of the evidence, even though the appellant had not properly preserved the sufficiency issue . . . because the record was 'simply not that clear' as to which issues in which motion were actually raised," and had also "held that even though the defendant failed to raise an issue in his Rule 50(a) motion but then raised it in his Rule 50(b) motion, review of this issue was proper because the spirit behind Rule 50 was

served in that the right to jury trial was not jeopardized and the opposing party had notice of the alleged error so as to cure any defect." *Singer*, 45 F.3d at 829 (citing *Miller v. Premier Corp.*, 608 F.2d 973 (4th Cir. 1979); *Federal Savings and Loan Ins. Corp. v. Reeves*, 816 F.2d 130 (4th Cir. 1987)).

The Fourth Circuit likewise recognizes that it "may consider an issue for the first time on appeal 'if the error is "plain" and if [its] refusal to consider such would result in the denial of fundamental justice.'" *Singer*, 45 F.3d at 827 (citation omitted). The Fourth Circuit will also address for the first time on appeal "arguments [that] raise purely legal questions based on facts not in dispute." *Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 544 n.*(4th Cir. 2005). *See also Childers v. Chesapeake and Potomac Telephone Co.*, 881 F.2d 1259, 1263 n.1 (4th Cir. 1989) (notwithstanding "general principle that an appellate court should not resolve in the first instance claims that have not been ruled upon by the district court. . . . *all of the questions being passed upon are squarely posed to the court as matters of law from the face of the complaint*") (emphasis added).

Finally, the Fifth Circuit does not "insist[] that parties strictly comply with this [Rule 50] procedural requisite, [but rather] . . . 'approach[es] this requirement with a liberal spirit.'" (*Logan v. Burgers Ozark Country Cured Hams, Inc.*, 263 F.3d 447, 457 (5th Cir. 2001) (citation omitted). Accordingly, the Fifth Circuit has "not required strict

compliance with Rule 50(b) and has excused technical noncompliance where the purposes of the requirement have been satisfied." *Taylor Publ'g Co. v. Jostens, Inc.*, 216 F.3d 465, 471 (5th Cir. 1999) (citation omitted). Thus, the Fifth Circuit allows a party to challenge the sufficiency of the evidence even where it has "fail[ed] to comply with the requirements of Rule 50(b), 'when the purposes of the rule have been satisfied because the court has had the opportunity to reconsider sufficiency as a matter of law and because the nonmovant has had the opportunity to cure any insufficiencies.'" *Delano-Pyle v. Victoria County, Tex.*, 302 F.3d 567, 572 (5th Cir. 2002) (quoting *Purcell v. Seguin State Bank & Trust Co.*, 999 F.2d 950, 956 (5th Cir. 1993)).

Petitioners' reliance on *Black v. J.I. Case Co.*, 22 F.3d 568, 572 (5th Cir. 1994), *Varghese v. Honeywell International Inc.*, 424 F.3d 411 (4th Cir. 2005), and *Johnson v. Sawyer*, 120 F.3d 1307, 1331 (5th Cir. 1997) – cases in which the Fourth and Fifth Circuits refused to review summary judgment decisions after a trial on the merits – is misplaced. (*See* Pet. at 21, 24). The Second Circuit, like the Fourth and Fifth Circuits, has held that "the post-trial appeal of a denial of summary judgment 'will not ordinarily lie' because '[t]he district court's judgment on the verdict after a full trial on the merits . . . supersedes the earlier summary judgment proceedings.'" *Jacques v. Dimarzio, Inc.*, 386 F.3d 192, 199 (2d Cir. 2004) (quoting *Pahuta v. Massey-Ferguson, Inc.*, 170 F.3d 125, 130 (2d Cir. 1999)). But IDJ's appeal was not based on the denial of its summary judgment motion; IDJ appealed from the denial of its Rule 50 and Rule 59 motions, as the Second Circuit noted. (Pet. App. 6a-7a).

TVT's reliance (Pet. at 22-23) on *Tapalian v. Tusino*, 377 F.3d 1 (1st Cir. 2004); *Hopp v. City of Pittsburgh*, 194 F.3d 434, 440 (3d Cir. 1999), *Bradford-White Corp. v. Ernst & Whinney*, 872 F.2d 1153 (3d Cir.), *cert. denied*, 493 U.S. 993 (1989), and *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802 (3d Cir. 1984), is equally misplaced, because all of these cases involved a complete failure to raise the relevant issue in the district court. In *Bonjorno*, for example, the Third Circuit explicitly noted that it had "studied the record in great detail at the places noted in Kaiser's brief and we can find nothing that would have put the plaintiffs or the district court on notice" of the waived issue. 752 F.2d at 815. Likewise, in *Hopp*, "the City failed to raise [the waived issue] before the jury returned its verdict." 194 F.3d at 440. In *Bradford-White*, the Third Circuit observed that the appellant "simply did not attempt to establish this affirmative defense before or at trial." 872 F.2d at 1161. Similarly, in *Tapalian*, the appellant never argued that it had raised the issue at any point in the district court. *See Tapalian*, 377 F.3d at 7 n.1. In contrast to *Bonjorno*, *Hopp*, *Bradford-White* and *Tapalian*, Respondents here raised their "single contract" tortious interference argument numerous times throughout the district court proceedings, as the Second Circuit found.

IV. THE SECOND CIRCUIT'S DECISION DOES NOT IMPLICATE THE SEVENTH AMENDMENT

In light of the Courts of Appeals' broad consensus that Rule 50 is to be liberally construed, and this Court's holding that the power to reach an issue for the first time on appeal lies within a circuit court's discretion, TVT's contentions that the Second Circuit's decision in this case improperly "disregards the importance of Rule 50 and its function in safeguarding the Seventh Amendment right to jury trial as

established by *Unitherm* and its predecessors" (Pet. at 16), and "threatens to swallow Rule 50 and erode Seventh Amendment rights" (Pet. at 18-20), is mere hyperbole. It "is settled that Rule 50(b) does not violate the Seventh Amendment's guarantee of a jury trial." *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 321 (1967). Furthermore, TVT never explains how its argument that "the *failure to file* a Rule 50(a) motion implicates a party's Seventh Amendment right to trial by jury" (Pet. at 16, citing *Unitherm*) (emphasis added) is remotely relevant here, given that IDJ filed both Rule 50(a) and 50(b) motions, and the District Court explicitly rejected the "single contract" argument in denying both motions.

Although TVT notes that Rule 50 "ensur[es] that an opportunity is given to 'cure any deficiency in that party's proof that may have been overlooked until called to the party's attention by a late motion for judgment'" (Pet. at 17 (quoting *Amendments to Rules of Civil Procedure for the United States District Courts*, 31 F.R.D. 587, 686 (1963)), TVT fails to explain how that observation bears on this case. The "single contract" argument accepted by the Second Circuit was raised repeatedly by Respondents before the case went to the jury and was ruled on by the District Court. Therefore, TVT had ample opportunity to address this argument and submit any additional relevant evidence.

TVT's argument that "[t]he issues reached by the Second Circuit . . . were inextricably intertwined with the issues put to the jury" regarding its tortious interference claim (Pet. at 17) misses the point. The Second Circuit ruled that the HOA and the SLA constituted a single contract as a matter of law. This issue should never have been put to the jury. As the Second Circuit stated, "there was nothing for the jury to decide." (Pet. App. 10a). In reversing the judgment on the tortious interference claim, the Second Circuit did not, as

TVT suggests, usurp the province of the jury by weighing the evidence. Instead, the Court of Appeals determined that the District Court had erred as a matter of law in submitting the contract interpretation question to the jury, because "[t]he conclusion is inescapable that the SLA and HOA were meant to be read together as a single contract, and therefore IDJ was not a stranger to the agreement." (Pet. App. 11a). As the Second Circuit correctly noted, under New York law "if the documents in question reflect no ambiguity as to whether they should be read as a single contract, the question is a matter of law for the court." (Pet. App. 9a); *see also Int'l Multifoods Corp. v. Comm. Union Ins. Co.*, 309 F.3d 76, 83 (2d Cir. 2002) (interpretation of unambiguous contract is matter of law for the court); *Compagnie Financiere de CIC et de L'Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 232 F.3d 153, 157-58 (2d Cir. 2000) (same).

The Second Circuit's decision concerning TVT's copyright infringement claim likewise does not implicate the Seventh Amendment. TVT argues that the Second Circuit's reversal of the judgment on copyright infringement was "not a ruling on a 'purely legal' issue divorced from the issues before the jury, but rather a conclusion that the evidence presented to the jury was insufficient because it found no evidence in the record that TVT had rescinded the license." (Pet. at 18). This is nonsense. "Judgment as a matter of law is appropriate when there is an absence of evidence on an issue or claim essential to a nonmoving party's cause of action." *Moore's Federal Practice* §50.05[3] at 50-24 (3d ed. 2006). The reason that the Second Circuit concluded that there was no evidence of rescission in the record is because TVT never sought rescission of the copyright licenses at

issue, a simple fact that TVT has never disputed, either before or after the Second Circuit's decision.[6]

TVT's half-hearted invocation of the Seventh Amendment is a red herring. The Seventh Amendment does not figure in TVT's Question Presented, nor do Petitioners actually contend that their Seventh Amendment rights were violated.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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6. In its Petition for Rehearing and Rehearing En Banc in the Second Circuit, TVT did not dispute that it had failed to seek rescission of the copyright licenses at issue, but rather argued that the Second Circuit had erred in interpreting its own precedents and that the reversal was procedurally improper. *See* Petition of TVT Records and TVT Music, Inc. for Rehearing and Suggestion for Rehearing En Banc, dated July 12, 2005.